IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

First Appeal No. 08 of 2002

Sri Kailash Chandra
S/o Sri Ram Swaroop
R/o Galla Mandi, Rudrapur
Tehsil Kichha
District Udhamsingh Nagar ……Applicant/appellant

Vs.

1. **State of Uttaranchal (Successor of State of U.P.) through Collector, Udhamsingh Nagar.**
2. **A.D.M. (Nazul) Rudrapur District Udhamsing Nagar. ……Respondents**

Shri M.C. Pandey, learned counsel for the appellant.
Learned Chief Standing Counsel for the respondents.

Hon'ble Prafulla C. Pant, J.

Heard learned counsel for the parties.

2. This appeal is directed against the order dated 28.11.2001 passed by learned District Judge, Udhamsingh Nagar in Misc. Case No. 79 of 2001, whereby an application moved by the plaintiff/appellant under Order 41 Rule 21 of Code of Civil Procedure, 1908, was rejected by the said court.

3. Brief facts of the case are that plaintiff filed a suit for injunction, against the defendants, restraining them from interfering any enjoyment of easementry right over the raasta in suit. The said suit No. 136 of 1995 appears to have been decreed by the trial court. An appeal was preferred against said decree, which was registered as Civil Appeal No. 93 for 2000, before the District Judge,

Udhamsingh Nagar. From the record, it appears that on 14.08.2001, the said appeal was heard as ex-parte and allowed by learned District Judge. Record further reveals that an application under Order 41 Rule 21 of the Code of Civil Procedure was moved on 11.09.2001 for rehearing of the appeal on the ground that the plaintiff (respondent in said appeal) was suffering from Jaundice on the date fixed for hearing of the appeal. Learned District Judge after hearing the parties, rejected the application on the ground that the illness shown by the plaintiff/applicant was not supported by medical certificate of any recognized Doctor. Aggrieved by said order, this appeal is preferred.

4. Learned counsel for the appellant argued that the application under Order 41 Rule 21 of the Code was supported by an affidavit, which remained un-controverted as the respondents have not filed any counter affidavit to it. This fact is not denied by learned Standing Counsel before this Court. Now, the only question remains to be seen is whether the lower appellate court was justified in rejecting the application on the ground that the illness was not corroborated by any medical certificate, issued by the Doctor. On perusal of the copy for the affidavit, filed by Shri Kailash Chandra (present appellant), it appears that the plaintiff was suffering from Jaudice. It is no where stated by him in the affidavit that he was under treatment of any particular Doctor or the hospital. Rather, it is stated in Para-3 of the affidavit that the deponent (plaintiff) was advised complete bed rest. In these circumstances, this Court is of the view that the application under Order 41 Rule 21

should have been allowed by the trial court, particularly when the defendant (appellant before the lower appellate court) had not filed any counter affidavit to controvert the fact relating to illness of the plaintiff.

5. Therefore, for the reasons as discussed above, in the opinion of this Court, this appeal deserves to be allowed. Accordingly, the appeal is allowed. The application moved under Order 41 Rule 21 of the Code of Civil Procedure, 1908, before the appellate court is allowed and ex-parte judgment and order dated 14.08.2001 passed by learned District Judge is set aside. Civil Appeal No. 93 of 2000, is restored and the same shall be disposed of by the concerned court in accordance with law.

(Prafulla C. Pant, J.)

Dt: 21 March, 2006
Sweta